IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 22934 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GUJARAT STATE EXPORT CORPORAT-ION LTD & 1 - Petitioner(s)

Versus

DIRECTOR GENERAL OF FOREIGN TRADE & 1 - Respondent(s)

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Appearance :
M/S TRIVEDI & GUPTA for Petitioner(s) : 1 - 2.
MR JITENDRA MALKAN for Respondent(s) : 1,
NOTICE SERVED for Respondent(s) : 2,
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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 03/02/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1.Heard Mr.Rakesh Gupta, the learned advocate for the petitioners. Rule. Mr.Malkan appearing on

behalf of the respondent authorities waives service of rule. The matter is taken up for final hearing and disposal today considering the facts and controversy involved.

2.The petition primarily challenges the communication dated 11/7/2005 addressed by Foreign Trade Development Officer for the Director General of Foreign Trade, New Delhi. Though the petitioner has described the said communication as an order, as shall be seen presently, it is merely a communication of a decision.

3.The petitioner company is engaged in business of export of goods. On 5/6/1992, the petitioner was granted an advance license by respondent No.2 for CIF value of Rs.23,54,951/- for import of POY Filament Yarn as per condition attached to the license. The petitioner company was required to discharge

export obligation of the FOB value to the tune of Rs.33,02,520. This value, namely, FOB value was reduced vide amendment sheet dated 20/7/1992 to Rs.32,46,756/-, and the total CIF value for imports was amended to read as Rs.25,10,210/-. On 5/8/1992, the petitioner company was granted Duty Exemption Entitlement Certificate (DEEC). It is the case of the petitioner that POY Filament Yarn valued at Rs.23,54,321/- was procured by the petitioner company from M/s Haryana Petrochemicals Ltd., Rewari as deemed export by the said party. To fulfill its export obligation, the petitioner company made exports of PTY and on realization of the export proceedings, presented the DEEC with copies of shipping bills before customs authorities at Mumbai for making of relevant entries regarding fulfillment of export obligation. It is further the say of the petitioner that the customs authorities misplaced the original DEEC book submitted by

the petitioner company and as the same could not be traced immediately, could not relate the same with the copies of the shipping bills with the records of the customs, resulting in non-entering of the exports in the DEEC.

4.After the DEEC was located, the customs authorities could trace only some of the shipping bills and tally with their records, resulting in not fully logging the export obligation. The respondent No.2, therefore, treated it as a failure of the petitioner company, namely, the petitioner company had failed to redeem its export obligation and was called upon to show cause as to why action should not be taken against the petitioner. It appears that there was exchange of correspondence between the parties and the petitioner company submitted various letters along with secondary evidence in the form of E.P. Copies of shipping bills, bank

certificates showing realization on exports made etc., in absence of the direct evidence of logging the exports in the DEEC. Thus, from 8/9/2003 till 21/1/2004, various communications were addressed by the petitioner company to respondent No.2. The case of the petitioner company is that, against export obligation to the tune of FOB value of Rs.32,46,756/-, the petitioner company had already fulfilled to the extent of Rs.31,54,493=95 as per realization certificate issued by the bank, resulting in actual shortfall to the extent of Rs.92,262/- only. According to the petitioner, this shortfall amounted to a mere 0.352% of the total export obligation which the petitioner was supposed to discharge and hence, the respondent No.2 could not have levied any penalty. However, the penalty to the tune of Rs.26,48,912/- was imposed, against which the petitioner preferred appeal.

5.It is the case of the petitioner that, on 17/12/2004, respondent No.1 informed the petitioner company that unless the amount of entire penalty is pre-deposited, the appeal cannot be admitted. The petitioner company thereupon communicated on various dates commencing from 18th December 2004 to 29th January 2005 when it was granted a personal hearing. Thereafter, the petitioner has been served with the impugned communication dated 11/07/2005.

6.Though Mr.Gupta has addressed the Court on the merits of controversy, namely, the default being technical in nature, lapse, if any, being procedural in nature etc., for the reasons that follow, it is not necessary to enter into any discussion on merits of the matter.

7.The impugned communication dated 11/7/2005 reads as under :

ANNEXURE “A”

Government of India
Ministry of Commerce & Industry
Department of Commerce
Directorate General of Foreign Trade
ECA-1, Udyog Bhawan,
New Delhi

NO.11/276/04-05/ECA-1/915
Dated : 11/7/2005

To :
M/s Gujarat State Export Corporation Ltd.
Gujarat Chambers Building
Ashram Road
Ahmedabad – 380 009

Sub:- Appeal against Adjudication Order No.08/F-5/32/AM-04/ECA dated 30/7/04

Gentlemen,

I am directed to refer to your letter dated 29/1/2005 on the subject mentioned above and to say that your submissions have been considered by the Appellate Authority and the penalty amount imposed in each Adjudication Order has been reduced to 25% (twenty five percent) of

its original amount, which is required to be paid within a period of two months from the date of issue of this letter.

You are, therefore, requested to deposit the required amount and furnish documentary evidence within the stipulated period for further consideration of your appeal.

Yours faithfully,
Sd/-
(P.S.Nagpal)
Foreign Trade Development Officer
For Director General of Foreign Trade
Tel:23016262 Ext. 282
E-mail: psnagpal@ub.nic.in"

8.As can be seen, the said communication, in the first instance, cannot be termed to be an order and hence, the Court called upon the learned counsel for the respondent authorities to produce the order. The learned counsel informed the Court that the original order is not available and this is only a communication of the order. In fact, he was hesitant to say whether any order has at all been made by the

appellate authority. However, he fairly accepted that the impugned communication did not contain any reasons as to why the petitioner was required to pre-deposit an amount of 25% of the penalty imposed.

9.Hence, it is apparent that there is no order made by the appellate authority in the first instance. If any such order has been made, the same has never seen light of the day, the same having not been communicated / served on the petitioner. Even the affidavit-in-reply does not state that any such order has been made and served on the petitioner. Therefore, on this count alone, the impugned communication cannot be permitted to stand and operate.

10.However, even if the impugned communication is considered to be conveying an order, it is apparent that the same suffers from total lack of application of mind. The petitioner has

only challenged one order levying penalty, but the said communication says that “penalty amount imposed in **each** adjudication order has been reduced to 25% of its original amount”. (emphasis supplied). The word “each” denotes more than one adjudication order considering that the said word precedes the words “adjudication order”. Therefore, possibly the appellate authority dealt with some other file and issued instructions to communicate the so-called order, which is not an order in legal parlance, but a fiat.

11. The position in law is well settled. An order directing pre-deposit of an amount of duty or penalty has to, in the first instance, take into consideration the prima facie case, if any, made out by the appellant before the authority. The next stage requires the authority to consider the aspect of financial hardship that may result on being required to

pre-deposit an amount by the aggrieved person before it; and lastly, on a judicious consideration of the entire facts and circumstances of the case, the aspect of balance of convenience needs to be taken into consideration. For this purpose, the authority must bear in mind that it is exercising quasi judicial powers which require that while making an order, it records the basic facts of the case before it, the contentions of both the sides, and thereafter, as stated hereinbefore, the three stages of prima facie case, financial hardship and balance of convenience. The impugned communication lacks the basic requirement of an order as understood in legal circles. It does not reflect that the authority is even aware of the duty cast on it in its role as a quasi judicial authority. Apparently, the distinction between exercise of powers on administrative side and in quasi judicial proceedings has been lost sight of.

12.In these circumstances, the impugned communication dated 11/7/2005 is quashed and set aside. The appellate authority shall grant a fresh opportunity of hearing to the petitioner, and thereafter, pass a reasoned order in accordance with law.

13.It is necessary to record that, on 28th November 2005, when this Court had issued notice, the petitioner was directed to deposit a sum of Rs.1 lakh on the basis of the petitioner's contention that default, if any, of the petitioner would amount to only Rs.92,262/-, and the petitioner has duly complied with the said condition imposed by this Court. In these circumstances, the petitioner is not required to make deposit of any further amount till its stay application is disposed of by the appellate authority as per directions issued by this Court.

14.Rule made absolute. The petition stands disposed of accordingly. There shall be no order as to costs.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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